ARMED FORCES TRIBUNAL
REGIONAL BENCH
GUWAHATI
(Through Video-conferencing)

OA 23 of 2020 WITH MA 15 of 2020

Ex- Nk Khaitinlam Vaiphei ... Applicant
Versus
Union of India & Ors. ... Respondent

For applicant : Mr. A R Tahbildar, Advocate
For the Respondents: Mr. B. Kumar, Advocate

CORAM:
HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON
HON'BLE LT GEN PM HARIZ, MEMBER(A)

O R D E R

MA 15/2020

1. Keeping in view the averments made in this application and finding the same to be bona fide, in the light of the decision in ***Union of India and others*** *Vs.* ***Tarsem Singh*** (2008) 8 SCC 648, the instant application is allowed condoning the delay in filing the OA. MA stands disposed of.

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2. This application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 by the applicant, a retired Naik of the Army, who is aggrieved by the rejection of his claim for disability

pension by PCDA (P) Allahabad vide letter no. G-3/70/36/4-03 dated 03.07.2003

3. The applicant was enrolled in the Army on 21.11.1986 in SHAPE-1 (the applicant has wrongly mentioned his date of enrolment as 21.03.1986 in the O.A). During service, the applicant suffered from the disease "MIGRAINE (V-67)" in Nov 1993, for which he was discharged from service on 01.11.2002 under Army rule 13 (3) III (v) being placed in low medical category after rendering 15 years , 11 months and 10 days of service before completion of terms and engagement on withdrawal of shelter appointment. The release medical board of the applicant was carried out on 29.07.2002. The medical board held the disability "MIGRAINE (V-67)" as neither attributable to nor aggravated by military service and assessed the disability @ 11-14% for life vide AFMSF-16 dated 29.07.2002 **(Annexure-5).** Further, since disability of the applicant was assessed at 11-14%, his case for grant of disability element of disability pension was not considered. The applicant made a belated claim for grant of disability element along with rounding off benefits on 03.08.2016 (**Annexure 10)** , which was rejected vide letter dated 17.08.2016 **(Annexure 11)**, Hence, this OA.

4. Learned counsel for the applicant submitted that, as per Regulation 173 of the Pension Regulations for the Army, 1961 is that unless otherwise specifically provided, a disability may be granted to an individual who are invalided out of service on account of disability which is attributable to or aggravated by military service and disability is assessed at 20% or over. But there is no provision to invalidate a person from service with disability below 20%. Therefore, the disability of an individual can't be assessed in two different parameters for two different purposes, i.e., the disability as a major one making him unfit to be retained in service and the same to be a minor one deny him the disability element of pension. Such a contradictory stand of the authorities are not substantiated by relevant provisions of law and therefore needs intervention of this Hon'ble Tribunal.

5. Further, learned counsel for the applicant submitted that as per Rule 5 of the Entitlement Rules for Causality Pensionary Awards, 1982 a member is presumed to have been in sound physical and mental condition upon entering service except to physical disabilities noted or recorded at the time of entrance. Further, Rule 9 of the

aforesaid Rule provides that the burden to disapprove the correlation of the disability with the service is with the authorities and categorically prescribes that 'benefit of doubt is to be given to the claimant. The counsel thus asserted that the release medical board had illegally and arbitrarily held the disease as neither attributable to, nor aggravated by military service.

6. Moreover, the onset of the disease was in November 1993 i.e. after eight years from date of enrolment and as such any disease that arose during service period of applicant's service must be due to stress and strain related to the military service. Further, while he was serving in counter insurgency area of Jakhama, the disease was first diagnosed, meaning thereby that intense physical activity, changes in sleep pattern in addition to the stress and strain of the military service had influenced in causing the disease. The burden to disprove the correlation of the disability with the Army has been cast on the authorities by the regulations, rules and the general principles and thus, any deviation from the statutory provisions of law would tantamount to non-conformance with the letter and spirit thereof, consequently denying disability pension to the applicant is bad in law and liable to be interfered with.

7. The respondents, in their counter affidavit, justified their action in denying disability element of pension to the applicant as the disability of the applicant was assessed by the RMB at less than 20%. Moreover, PCDA(P), Allahabad is the final authority for sanctioning pension with concurrence with Medical Advisor (Pension). Accordingly, Medical Advisor (Pension) had rejected his disability element vide their letter No G3/70/36/4-03 dated 03.07.2003 as the competent medical authorities considered the disease as "neither attributable to nor aggravated by military service" with assessment of disability being less than 20% i.e. @ 11-14% for life. Moreover, the applicant did not not prefer his first appeal in the stipulated timeframe of five years from date of rejection of his disability claim.

8. Further, learned counsel for the respondents had submitted that as per Para 173 of the Pension Regulations for the Army, 1961 (Part I), the primary condition for grant of disability pension is that unless otherwise specifically provided, a disability pension may be granted to an individual who is invalided out from service on account of a disability which is either attributable to or aggravated by military

service and disability is assessed at 20% or over. The O.A is, therefore, liable to be dismissed with costs.

9. Having heard the rival submissions and perused the records, including the RMB proceedings, the question that falls for our consideration is, whether the applicant is entitled to disability pension when the RMB assessed his disability at 11-14%?

10. Looking to the question arising in this O.A, we do not think it necessary to narrate the factual aspects again. We are in agreement that various criteria have been prescribed in the guidelines under the Regulations as to when the disease or injury is attributable to military service. It is seen from Para 173 of the Regulations that disability pension would be computed only when disability has occurred due to a wound, injury or disease which is attributable to military service or existed before or arose during military service and has been and remains aggravated during the military service. Further, Para 4 of the Entitlement Rules for Casualty Pensionary Awards to the Armed Forces Personnel 2008 states that invalidation from service with disablement caused by service factors is a mandatory condition for grant of disability pension. However,

disability element will also be admissible to personnel who retired or are discharged on completion of terms of engagement in low medical category on account of disability attributable to or aggravated by military service, provided the disability is accepted as not less than 20%. If these conditions are satisfied, necessarily the incumbent is entitled to disability pension. In the case on hand, the disability of the applicant was assessed at 11-14%, as such he is not entitled to disability element of disability pension. This view is strengthened by the decisions of the Hon'ble Supreme Court, which we would now refer to in the following paragraphs.

11. In the case of *Secretary, MoD and others vs A.V Damodaran and others* (2009) 9 SCC 140, the Hon'ble Supreme Court has brought out the following principles with regard to primacy of medical opinion:

> *8. When an individual is found suffering from any disease or has sustained injury, he is examined by the medical experts who would not only examine him but also ascertain the nature of disease/injury and also record a decision as to whether the said personnel is to be placed in a medical category which is lower than 'AYE' (fit category) and whether temporarily or permanently. They also give a medical assessment and advice as to whether the individual is to be brought before the release/*

invalidating medical board. The said release/invaliding medical board generally consists of three doctors and they, keeping in view the clinical profile, the date and place of onset of invaliding disease/disability and service conditions, draws a conclusion as to whether the disease/injury has a causal connection with military service or not. On the basis of the same they recommend (a) attributability, or (b) aggravation, or (c) whether connection with service. The second aspect which is also examined is the extent to which the functional capacity of the individual is impaired. The same is adjudged and an assessment is made of the percentage of the disability suffered by the said personnel which is recorded so that the case of the personnel could be considered for grant of disability element of pension. Another aspect which is taken notice of at this stage is the duration for which the disability is likely to continue. The same is assessed/ recommended in view of the disease being capable of being improved. All the aforesaid aspects are recorded and recommended in the form of AFMSF- 16. The Invalidating Medical Board forms its opinion/ recommendation on the basis of the medical report, injury report, court of enquiry proceedings, if any, charter of duties relating to peace or field area and of course, the physical examination of the individual.

9. The aforesaid provisions came to be interpreted by the various decisions rendered by this Court in which it

has been consistently held that the opinion given by the doctors or the medical board shall be given weightage and primacy in the matter for ascertainment as to whether or not the injuries/illness sustained was due to or was aggravated by the military service which contributed to invalidation from the military service.

12. In the case of *Bachan Prasad v. Union of India* (C.A No. 2259 of 2012 dated 04.09.2019), the Hon'ble Supreme Court has held that an individual is not entitled to disability element if the disability is less than 20%. The relevant paragraph of the said decision is reproduced as under:

After examining the material on record and appreciating the submissions made on behalf of the parties, we are unable to agree with the submissions made by the learned Additional Solicitor General that the disability of the appellant is not attributable to Air Force Service. The appellant worked in the Air Force for a period of 30 years. He was working as a flight Engineer and was travelling on non-pressurized aircrafts. Therefore, it cannot be said that his health problem is not attributable to Air Force service. However, we cannot find fault with the opinion of the Medical Board that the disability is less than 20%. The appellant is not entitled for disability element, as his disability is less than 20%.

13. In *Union of India and others v. Wing Commander S.P Rathore* (C.A No. 10870 of 2018 decided on 11.12.2019), the Hon'ble Supreme Court has held that that disability element is not admissible if the disability is less than 20%, and that the question of rounding off would not apply if the disability is less than 20%.

14. In the case of the applicant, since the disability of the applicant does not meet the criteria of being more than 20% and not aggravated by military service, he is not eligible for grant of disability element of disability pension. Accordingly, the O.A fails and is dismissed.

15. No order as to costs.

Pronounced in open Court on this 15th day of May, 2023.

(JUSTICE RAJENDRA MENON)
CHAIRPERSON

(LT GEN P.M HARIZ)
MEMBER (A)

Ashok